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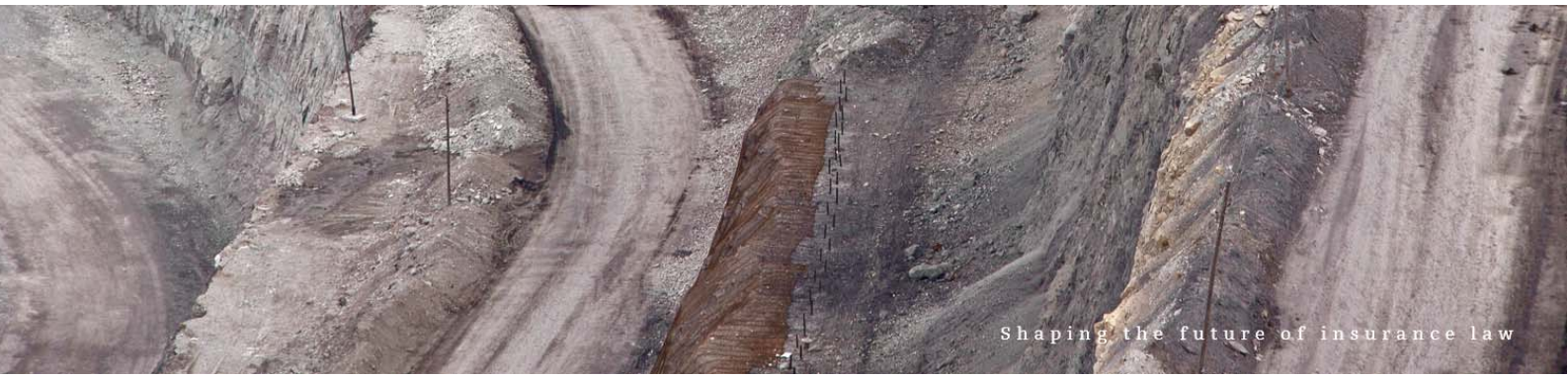


D&O liability risks arising out of mining and energy decommissioning

2 SEPTEMBER 2021

AT A GLANCE

- Governments have been left to foot the bill for hundreds of millions of dollars for rehabilitation costs following high profile collapses of mining and energy companies.
- The risk of future exposures remains high as many mine and oil and gas facility closures are either premature or unplanned, which increases the risk that decommissioning remediation obligations will not be met.
- In response, the Commonwealth Government and some state and territory governments have introduced legislation to pass on these costs to 'related persons', which could include directors and officers.
- This legislation, and the prospect of similar legislation being introduced in other states, means that D&O insurers need to be aware of the risks to directors and officers that arise from remediation obligations.

Regulation of decommissioning

The decommissioning of onshore mines and petroleum sites is regulated by the laws of the individual Australian states and territories. The decommissioning of offshore oil and gas sites is regulated by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (OPGGS Act).

There are more than 350 operating mines[1] and approximately 50,000 legacy mines[2] in Australia. Only 25% of mine closures are planned, with 75% being either premature or unplanned closures.[3] Premature and unplanned closures increase the risk that decommissioning remediation obligations will not be met.

Unlike its mining industry, Australia's oil and gas industry is in its relative infancy when it comes to decommissioning. As our offshore oil and gas sector continues to mature, late in life assets are acquired by smaller companies. This increases the risk of premature closure due to insolvency.

Increasingly, community pressure to transition to a low carbon economy is also boosting the risks of premature closure of mines and carbon-based energy facilities. These operations are also becoming economically

[1] https://www.ga.gov.au/education/classroom-resources/minerals-energy/australian-mineral-facts#:~:text=Australia%20produces%2019%20useful%20minerals,as%20metals%20can%20be%20extracted.
[2] Ground Truths: Taking Responsibility for Australia's Mining Legacy
[3] Laurence

unviable due to greater regulatory burdens and the inability to gain funding or insurance.

Chain of responsibility – extension of liability to 'related persons'

In 2016 Queensland Nickel collapsed, leaving the Queensland Government to foot a remediation bill for the Yabulu nickel refinery. That cost may ultimately amount to between tens to hundreds of millions of dollars.[4]

Following that exposure, the Queensland Government amended the *Environmental Protection Act* 1994 (Qld) to allow an Environmental Protection Order to be issued to:

- a person capable of benefiting financially from the company that has not complied with its environmental obligations, or
- a person who in the past two years has been in a position to influence the company's compliance with its environmental obligations.

The Northern Territory Government has also committed to introducing chain of responsibility legislation, which is similar to the Queensland legislation, to petroleum activities and potentially mining.[5]

In 2019, the company that owned Northern Endeavour, an offshore oil facility 550 kilometres north-west of Darwin, went into liquidation leaving the Commonwealth Government to fund what could be $1billion in clean-up costs.[6]

This has prompted the Commonwealth Government to propose amendments to the OPGGS Act to allow the Government to pursue 'related persons' who have significantly benefitted financially from the project (or will) or persons who are (or have been) in a position to influence an entity's compliance with the OPGGS Act for remediation costs.[7] The amendments have passed the House of Representatives and are being considered by the Senate.[8]

NSW and Victoria do not have specific 'chain of responsibility' legislation. In NSW, if the public authority suspects a company director of having caused the pollution incident, it can require them to pay expenses regarding the clean-up action. This was seen in the *Kempsey Shire Council v Slade* [2015] NSWLEC 135 decision. Similar cost recovery powers are available to the Victorian regulator.

The NSW Government budget announced in June 2021 included $108 million over the next ten years to remediate the state's disused legacy mine sites. This has prompted a proposal for a parliamentary inquiry into why the Government is footing this bill.[9] If such an enquiry occurs, it may lead to the introduction of chain of responsibility legislation in NSW.

Case Study – Linc Energy

Linc Energy operated an underground coal gasification plant in Queensland.

Linc injected air into underground combustion chambers at pressures that were too high, causing the rock surrounding the coal seam to fracture and allowing toxic gases to escape.

Between 2015 and 2018, the Queensland Government imposed an "excavation exclusion zone" on more than 300 square kilometres around the Linc facility, where landholders were banned from digging any hole deeper than two metres.[10] Monitoring and remediation of the site are expected to take decades.

Linc Energy went into liquidation in 2016. The regulator in Queensland issued an Environmental Protection Order to the former Chairman and Managing Director of Linc Energy, requiring him to personally bear the costs of remediation and rehabilitation of the damaged site and to provide a bank guarantee worth $5.5 million.

On 6 August 2021, the Queensland Court of Appeal issued a judgment with respect to four of Linc's directors, including the former Chairman, who were criminally charged with failing to ensure Linc's compliance with its environmental obligations.[11]

[4] https://www.australianmining.com.au/news/answers-needed-from-palmer-over-queensland-nickel-collapse/
[5] https://denr.nt.gov.au/__data/assets/pdf_file/0011/956891/regulation-of-mining-activities-consultation-paper-122020.pdf
[6] https://www.abc.net.au/news/2021-04-14/northern-endeavour-oil-vessel-could-cost-taxpayers-1-billion/100044914
[7] https://consult.industry.gov.au/offshore-resources-branch/opggs-amendment/user_uploads/overview---opggs-amendment-titles-administration-and-other-measures-bill-2021-pdf.pdf
[8] https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6714
[9] https://www.abc.net.au/news/2021-06-24/malcolm-turnbull-call-for-inquiry-into-mine-remediation/100237850#:~:text=As%20part%20of%20the%20approvals,to%20mine%20within%20the%20state.&text=Rehabilitation%20obligations%20are%20legally%20enforceable,even%20after%20the%20mine's%20closure.
[10] https://www.abc.net.au/news/2018-04-09/court-linc-energy-guilty-serious-environmental-harm-ucg-plant/9632964
[11] *R v Dumble & Ors* [2021] QCA 161

***Case Study – Linc Energy* continued:**

The Court unanimously found that if a corporation unlawfully causes serious environmental harm then each of its executive officers also commits an offence. There is no requirement to prove that the officer was involved in the commission of the offence. The officer may rely on a defence that they took all reasonable steps to ensure that the corporation did not commit the offence. However, the Court also determined that the prosecution must prove that the officer was an officer of the corporation at the time that the serious environmental harm occurred (rather than when the act causing the eventual harm took place).

Following this judgment, the prosecution dropped the charges against the executives for evidentiary reasons. However, the judgment does flag risks for D&Os given the Court determined that the officers did not need to have been involved in the offence to be found guilty of it.

Disclosure obligations

Mining and energy site operators are obliged to consider whether they ought to disclose their environmental liabilities. Plaintiffs are seeking to link contamination incidents to prior statements by the board or regulator that indicated that no such event was foreseeable.

For example, in the US a class action has been filed against Chemcours (and its CEO and COO) on the basis that from 2017 to 2019 it misled investors by representing that Chemours had appropriately accounted and accrued reserves for its environmental liabilities. In 2019, it was revealed that it had to contribute up to $2 billion to a fund to cover expenses from lawsuits, including claims by states over alleged perfluoroalkyl and polyfluoroalkyl substances (PFAS) contamination.

Case Study – New Standard Energy

New Standard Energy (NSE) drilled four oil wells in 2011 and 2012. NSE's auditor had noted a liability was not included in the company's financial reporting, despite Western Australia's Department of Mines, Industry Regulation and Safety directing the company to complete rehabilitation.

The Australian Stock Exchange (ASX) formally requested an explanation for why an environmental liability for rehabilitating the well sites was not included in the company's financial reporting. NSE responded to the ASX that the cost was not possible to estimate without visiting the long-abandoned desert exploration wells. In response, the ASX suspended NSE until NSE demonstrated, to ASX's satisfaction, that it can reliably estimate its rehabilitation obligations.

Insurance issues to consider

Given the serious environmental risks and rapid expansion of liabilities associated with decommissioning, directors and officers will undoubtedly seek D&O cover for individual liabilities.

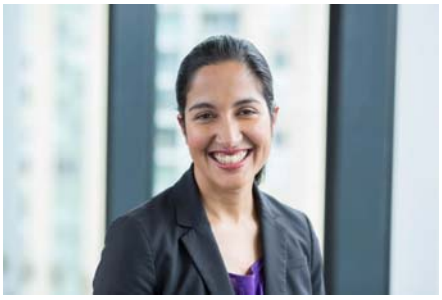
Insurers covering Australian projects should be aware of this demand and consider the extent to which they want to provide cover. They should consider the scope of any exclusions if their intention is not to incur liability for such claims. They should also assess the ability of the company to accurately identify, provision for and report on remediation obligations.

In turn, directors and officers need to understand the extent to which commonly included pollution exclusions in D&O and management liability policies could apply to exclude cover for individual liabilities. They may also want to consider whether they need to negotiate extended cover.

Directors & officers need to understand the extent to which commonly included pollution exclusions in D&O and management policies could exclude cover for individual liabilities.

Need to know more?

For more information please contact us.



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